

**Before the
Internet Corporation for Assigned Names and Numbers
Portola Valley, California**

In the Matter of

)
Final Report of the WIPO Internet)
Domain Name Process)
)

**Comments of the
Office of Advocacy
U.S. Small Business Administration**

The Office of Advocacy of the United States Small Business Administration (“Advocacy”) submits these Comments on the World Intellectual Property Organization’s (“WIPO”) Final Report on the Internet Domain Name Process (“Final Report or “WIPO’s Recommendation”),¹ in response to the Internet Corporation for Assigned Names and Numbers’ (“ICANN”) request for comments in preparation for the meeting of the ICANN Board of Directors in Berlin, Germany on May 27, 1999. Advocacy believes that ICANN did not provide reasonable notice in violation of ICANN’s bylaws and the Administrative Procedure Act and requests that ICANN revise the comment period and postpone a final decision until it has had the opportunity to fully consider the comments filed. Advocacy also recommends that ICANN adopt WIPO’s definition of abusive registration. Finally, Advocacy recommends that ICANN refer famous and well-known mark exception to the DNSO for further comments.

The United States Congress established the Office of Advocacy in 1976 by Pub. L. No.

¹ World Intellectual Property Organization, *Final Report of the WIPO Internet Domain Name Process*, (rel. April 30, 1999) <<http://wipo2.wipo.int>> (last visited May 20, 1999).

94-305² to represent the views and interests of small business within the U.S. Federal government. Its statutory duties include serving as a focal point for concerns regarding the government's policies as they affect small business, developing proposals for changes in U.S. Federal agencies' policies, and communicating these proposals to the agencies.³

Small businesses are a crucial element of the U.S. economy and the Internet. In 1998, there were 23 million small businesses in the United States, who represent more than 99 percent of all employers in this country. Small businesses employ 52 percent of private workers and employ 38 percent of private workers in high-tech occupations. Virtually all of the net new jobs in the United States were provided by small businesses.

These small businesses are using the Internet. As of November 1998, 41 percent of small and mid-sized businesses have a Web site, 22 percent of small and mid-sized businesses are using the Internet to sell goods and services, and 18 percent are using the Internet to purchase goods and services for their firms or to share data with suppliers and customers. Any policy that detrimentally affects the ability of these small businesses to use the Internet would have a significant impact on this nation's economy and limit the effectiveness of the Internet as a tool of business and commerce.

I. ICANN Did Not Give Adequate Notice or Opportunity to Make Meaningful Comments.

Advocacy believes that small business did not receive sufficient or reasonable notice of these proceedings to make meaningful comments to these proceedings which violates both ICANN's bylaws and the United States' Administrative Procedure Act ("APA").⁴ ICANN's bylaws require the Board of Directors to "(i) provide public notice on the Web Site explaining

² Codified as amended at 15 U.S.C. §§ 634 a-g, 637.

³ 15 U.S.C. § 634c(1)-(4).

⁴ 5 U.S.C. §§ 551-9.

what policies are being considered for adoption and why; (ii) provide a reasonable opportunity for parties to comment on the adoption of the proposed policies, to see the comments of others, and to reply to those comments . . .”⁵ Notice and comment is a central feature of the APA. When properly followed, it allows all parties a chance to participate in an agency’s rulemaking process. It also allows the U.S. federal agency the opportunity to receive comments which may identify problems or issues the agency did not consider. Although ICANN is not subject to the APA, Advocacy believes that ICANN’s close relationship with the U.S. Department of Commerce makes it appropriate to follow its procedure and allow opportunity for notice and comment.

A. ICANN Did Not Provide Sufficient Notice to Commenters.

The notice posted by ICANN on its Web page was vague and insufficient to give sufficient notice required by ICANN’s bylaws and the APA. ICANN announced the WIPO Recommendation and, without any further comment, opened a comment period and stated that it is considering “appropriate action [on the WIPO Final Report], which may include seeking further comments on the recommendations, referring of some or all of them to other ICANN entities, and/or adopting certain of the recommendations.”⁶ Advocacy believes that that this language does not provide commenters with enough information to provide meaningful comments and violates fundamental fairness principles that require a decision maker opening a comment period “provide sufficient factual detail and rationale for the rule to permit interested parties to comment meaningfully.”⁷ Instead, ICANN should have listed which sections of WIPO’s Recommendation it is considering adopting and why, which sections it is considering sending to the Domain Name Support Organization (“DNSO:”) and why, and which sections

⁵ ICANN, *Bylaws (revised)*, Article III, Section 3(b) <<http://www.icann.org/bylaws-09apr99.html>> (last visited May 20, 1999).

⁶ ICANN, *WIPO Report*, <<http://www.icann.org/wipo/wipo.htm>> (last visited May 20, 1999).

⁷ *Florida Power and Light Co. v. United States*, 846 F.2d 765, 771 (D.C. Cir. 1988).

ICANN considers inappropriate for adoption and why. This would have brought ICANN's notice in conformity with its bylaws and the APA.

B. ICANN Did Not Provide Reasonable Opportunity to Respond.

In addition to the insufficiency of the notice, ICANN did not provide commenters with reasonable notice as required by ICANN's bylaws and the APA.⁸ As a court interpreting the APA stated, "The rule-making and notice provisions of APA were designed to assure fairness and mature consideration of rules of general application."⁹ Reasonable notice is necessary to ensure that fairness.

Where decisions involve issues of public policy that impact a broad group that includes consumers and small businesses, the U.S. Federal Communications Commission or the U.S. Federal Trade Commission generally allow 60 to 90 days for comment. This period allows organizations to review the proposals, share and receive information with memberships, and prepare comments. Advocacy believes that a period of less time to comment on the WIPO's sizable and detailed Final Report is not reasonable.

ICANN posted the notice of WIPO's Recommendation on May 5 and asked for all comments to be received by May 21, which created a comment period for this lengthy document on the most controversial subject of Internet governance to date of only 16 days. The Final Report consisted of a 114-page main section, hundreds of footnotes, and 89 pages of detailed, substantive annexes, dealing with the specific proposed policies and rules that WIPO recommends. Furthermore, this material cannot be scanned or reviewed quickly. It is

⁸ See *supra* note 5; 5 U.S.C. § 553(b).

⁹ *du Pont de Nemours & Co. v. Train*, 541 F.2d 1018 (1976).

substantively different from the WIPO's Interim Report,¹⁰ and in light of the balance of rights between trademark holders and those without trademarks (including many small businesses), we believe this report requires extremely careful review and broad discussion. While the large trademark holders may have the staff and resources to fully review and respond to this report, such a comment period unfairly discriminates against individuals and small businesses that do not.

Advocacy requests that ICANN revise the current comment period and open forum into a broad solicitation of views on how ICANN should move forward with evaluating the WIPO Recommendations. ICANN should then initiate another comment proceeding with a detailed discussion of the terms and substance of its proposed rules, and its rationale. Such a comment period and open meeting should have between 60 to 90 days for input. A final decision by the ICANN's Board of Directors should be scheduled for a later date so that the ICANN Board can fully consider the views it has heard.

II. WIPO's Dispute Resolution Procedure Achieves a Balance Between Small Business Interests and Large Intellectual Property Owners.

Advocacy believes that the dispute resolution process recommended by WIPO in its Final Report obtains a fair balance between the interests of intellectual property owners holders and small businesses. Advocacy applauds WIPO's decision to limit the arbitration process to instances of abusive registrations in its recommendation. By doing so, WIPO greatly reduced the danger of harm to small businesses and lessened the threat of reverse domain name hijacking.

The definition of abusive registration is fundamental to the balanced nature of WIPO's Recommendation.¹¹ It is absolutely crucial to that the definition be maintained in its entirety,

¹⁰ World Intellectual Property Organization, *Interim Report of the WIPO Internet Domain Name Process*, (rel. Dec. 23, 1999) <<http://wipo2.wipo.int>> (last visited May 20, 1999).

¹¹ Final Report ¶¶ 170-7.

and include the lack of interest and registration in bad faith requirements.¹² Advocacy also recommends that ICANN adopt WIPO's language that a good faith intention to use the domain name, which can be shown through business plans, correspondence, reports, or other forms of evidence.¹³

III. ICANN Should Refer Famous and Well-Known Marks to the DNSO for Further Comment.

As Advocacy stated in its comments to WIPO in response to the Interim Report, Advocacy is deeply concerned that the proposed WIPO's recommendations on famous and well-known marks could be used to illegitimately expand the rights of trademark holders.¹⁴ WIPO recognized that the typical limitations on the protection famous and well-known marks, such as geographic limitations¹⁵ and same goods and services limitations,¹⁶ are absent on the Internet. Due to the brevity of the comment period, Advocacy did not have the opportunity to fully study the impact that of WIPO's recommendations on small businesses. Similarly, Advocacy believes that ICANN does not have a public record developed enough to issue a decision. Therefore, Advocacy strongly recommends that ICANN refer this issue to the DNSO for further development of the record.

However, in the event that ICANN decides to issue a decision at the May 27 meeting and that an exclusion is warranted, Advocacy tentatively agrees with WIPO that ICANN should hold attempts to qualify for famous or well-known marks to an extremely stringent standard.¹⁷ Advocacy also tentatively agrees with WIPO's recommendation that an exclusion should not

¹² *Id.* at ¶ 171.

¹³ *Id.* at ¶ 172.

¹⁴ Comments of the Office of Advocacy, U.S. Small Business Administration, *WIPO Internet Domain name Process*, RFC-3 (filed March 19, 1999).

¹⁵ Final Report at ¶ 271.

¹⁶ *Id.* at ¶ 272.

¹⁷ *Id.* at ¶ 274 (. . . discipline and rigor in relation to the criteria for assessment of entitlement to an exclusion . . . are

have a retroactive effect.¹⁸ Advocacy's tentative agreement for stringent standards if an exclusion is adopted should not be mistaken as supporting an exclusion for famous and well-known marks.

Conclusion

Advocacy believes that ICANN did not provide reasonable notice for the solicitation of comments in violation of ICANN's bylaws and the APA. Advocacy requests that ICANN clarify its notice and revise the comment period to allow 60 to 90 days for commenters to respond. Also, Advocacy requests that ICANN postpone a final decision until it has had the opportunity to fully consider the comments filed.

In response to WIPO's Final Report, Advocacy believes that the dispute resolution process recommended by WIPO in its Final Report strikes a fair balance between the interests of intellectual property owners holders and small businesses if the limitations on what qualifies as abusive registration is left intact. Finally, Advocacy recommends that ICANN refer famous and well-known mark exception to the DNSO for further comments.

Respectfully submitted,

Eric E. Menge
Assistant Chief Counsel for Telecommunications

Office of Advocacy
U.S. Small Business Administration
409 3rd St., S.W.
Suite 7800
Washington, D.C. 20416
Phone: 202-205-6949
Fax: 202-205-6928
E-mail: eric.menge@sba.gov

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required on the part of all . . .).

¹⁸ *Id.* at ¶ 276.